

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JEFFREY BURTON,

Plaintiff,

vs.

FUNDMERICA, INC., a California
corporation,

Defendant.

8:19-CV-119

MEMORANDUM AND ORDER

This matter is before the Court on the plaintiff's motion for default judgment against the only remaining defendant, Fundmerica, Inc. [Filing 33](#). The plaintiff sued Fundmerica and others on March 20, 2019, [filing 1](#), and timely served process on its registered agent, [filing 11](#). On motion, the Clerk of the Court entered Fundmerica's default on May 1, 2019. [Filing 14](#). Over time, the plaintiff's claims against the other defendants were dismissed, resulting in the plaintiff's present motion for default judgment. [Filing 19](#); [filing 20](#); [filing 25](#); [filing 30](#). The Court will grant the plaintiff's motion.

When a default judgment is entered, the facts alleged in the plaintiff's complaint—except as to damages—may not be later contested. [Marshall v. Baggett](#), 616 F.3d 849, 852 (8th Cir. 2010); [Murray v. Lene](#), 595 F.3d 868, 871 (8th Cir. 2010). It remains for the Court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law. *Id.* It is incumbent upon the Court to ensure that the unchallenged facts constitute a legitimate cause of action before entering final judgment. [Marshall](#), 616 F.3d at 852-53.

Fundmerica is in the business of selling capital loans. [Filing 23 at 2](#). On around February 13, 2019, the plaintiff received a voicemail on his cellphone

containing a prerecorded voice message advertising Fundmerica's services. [Filing 23 at 3](#). The plaintiff had never consented to receive calls from Fundmerica. [Filing 23 at 3](#).

This, according to the plaintiff, is enough to state a claim for violation of the Telephone Consumer Protection Act (TCPA), [47 U.S.C. § 227\(b\)\(1\)\(A\)\(iii\)](#).¹ [Filing 23 at 4](#). And that's right. The TCPA prohibits, among other things, a caller from making a call using an artificial or recorded voice to a cellular telephone service. *Id.* In other words, the TCPA prohibited almost all "robocalls" to cell phones. [Barr v. Am. Ass'n of Political Consultants, Inc.](#), 140 S. Ct. 2335, 2344 (2020).² According to the uncontested allegations of the complaint, Fundmerica made such a call to the plaintiff, and because the plaintiff received an unwanted telemarketing message, he has suffered a concrete and particularized injury in fact, warranting damages. [Golan v. FreeEats.com, Inc.](#), 930 F.3d 950, 958-59 (8th Cir. 2019).

The TCPA provides for damages of actual monetary loss or \$500 per violation, whichever is greater. § 227(b)(3)(B). In addition, if the violation was willful or knowing, the Court may treble those damages. § 227(b)(3)(C). In the comparable context of treble damages under the Patent Act, "[t]he sort of conduct warranting enhanced damages has been variously described . . . as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate." [Halo Elecs., Inc. v. Pulse](#)

¹ The Court interprets the plaintiff's motion for default judgment, based solely on the TCPA, as abandoning his California state-law claims. *Compare* [filing 23 at 5-7](#), with [filing 33 at 2](#).

² The Supreme Court held last month in *Barr* that one of the exceptions to this general prohibition, for calls made solely to collect a government debt, violated the First Amendment, but that it was severable from the TCPA as a whole—so, the provision on which the plaintiff's claim relies survived. *See id.* at 2355.

Elecs., Inc., 136 S. Ct. 1923, 1932 (2016). But in addition to alleging the one call for which he seeks damages, the plaintiff's complaint also alleges a course of conduct by Fundmerica that—taken as true—easily describe egregiously willful and knowing violation of the TCPA. See [filing 23 at 3-4](#). That is, in fact, the only reasonable inference from concealing the identity of a caller from caller ID. See [filing 23 at 4](#). Accordingly, the Court will award treble damages.

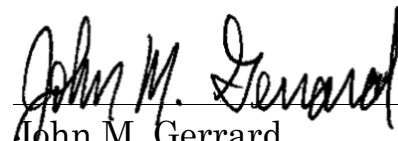
Finally, the plaintiff requests his filing fees as costs. The Court will deny that request without prejudice to reassertion in a timely bill of costs. See [NECivR 54.1](#); *see also* [Fed. R. Civ. P. 54\(d\)\(1\)](#).

IT IS ORDERED:

1. The plaintiff's motion for default judgment ([filing 33](#)) is granted.
2. Judgment will be entered for the plaintiff and against Fundmerica, Inc. in the amount of \$1,500.
3. A separate judgment will be entered.

Dated this 5th day of August, 2020.

BY THE COURT:



John M. Gerrard
Chief United States District Judge